

STATE OF IOWA
DEPARTMENT OF COMMERCE
UTILITIES BOARD

IN RE: IES UTILITIES INC.	DOCKET NO. E-21324
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ORDER AFFIRMING PROPOSED DECISION AND ORDER

(Issued March 1, 2000)

APPEARANCES

VERLE W. NORRIS, Attorney at Law, 214 South Franklin Street, Corydon, Iowa 50060, appearing on behalf of IES Utilities Inc.

JENNIFER C. EASLER, Attorney at Law, 310 Maple Street, Des Moines, Iowa 50319, appearing on behalf of the Consumer Advocate Division of the Department of Justice.

PHILIP E. STOFFREGEN, Attorney at Law, 1600 Hub Tower, 699 Walnut Street, Des Moines, Iowa 50309, appearing on behalf of the Lee County Conservation Board.

SHARON A. JOHNSON, 3729 210th Ave., Keokuk, Iowa 52632, an objector.

GARY A. JOHNSON, 3729 210th Ave., Keokuk, Iowa 52632, an objector.

KRISTIN E. NELSON WHITAKER, 3347 Johnson St. Road, Keokuk, Iowa 52632, an objector.

I. PROCEDURAL HISTORY

On August 27, 1997, IES Utilities Inc. (IES) filed with the Utilities Board (Board) a petition for franchise to erect, maintain, and operate approximately 11.7 miles of nominal 161 kilovolt (Kv) electric transmission lines in Lee County, Iowa. In

the petition, IES requested it be vested with the power of eminent domain over one parcel of land owned by the Lee County Conservation Board. On March 20, 1998, the Board assigned the matter to an administrative law judge. The administrative law judge set a procedural schedule, and on November 17, 1998, the administrative law judge held an evidentiary hearing. The evidentiary hearing adjourned without concluding on November 18, 1998. The hearing resumed on December 15, 1998, and concluded on December 16, 1998. On March 18, 1999, the administrative law judge issued a "Proposed Decision and Order Denying Franchise." See, IES Utilities Inc., Docket No. E-21324 ("Proposed Decision and Order," issued March 18, 1999, pp. 10-12) (hereinafter "Proposed Decision").

On April 1, 1999, IES filed with the Board a notice of appeal of the proposed decision and order. On April 13, 1999, the Board issued an order setting a briefing schedule. Briefs were filed by IES, the Consumer Advocate Division of the Department of Justice (Consumer Advocate), the Lee County Conservation Board (LCCB), Sharon A. Johnson, Gary A. Johnson, and Kristin E. Nelson Whitaker. On September 15, 1999, the Board granted IES's motion to hold the proceeding in abeyance while it reviewed alternatives that it hoped would eliminate some of the issues on appeal. IES renewed its motion on October 12, 1999, and the Board granted the motion on October 26, 1999. On November 22, 1999, IES filed a motion to terminate the order holding the proceeding in abeyance. The Board granted this motion on December 9, 1999.

The Board has reviewed the proposed decision and order, the notice of appeal, the briefs filed by the parties, and the evidence in the record of this docket and will affirm the proposed decision. The proposed decision shall constitute the final order in this proceeding.

II. ISSUES RAISED BY THE APPEAL

A. IF THE BOARD FINDS THE PROPOSED LINE COMPLIES WITH IOWA CODE § 478.4, MUST THE LINE BE APPROVED?

Iowa Code § 478.4 states, in part:

It [the Board] may grant the franchise in whole or in part upon the terms, conditions, and restrictions, and with the modifications as to location and route as may seem to it just and proper. Before granting the franchise, the utilities board shall make a finding that the proposed line or lines are necessary to serve a public use and represents a reasonable relationship to an overall plan of transmitting electricity in the public interest.

The administrative law judge found IES's proposed line is necessary to serve a public use and represents a reasonable relationship to an overall plan of transmitting electricity in the public interest. In its appeal, IES contends that because the administrative law judge found the proposal met the requirements of § 478.4, it must be approved.

The Board agrees with the administrative law judge's finding that the evidence shows the proposed line is necessary to serve a public use and represents a reasonable relationship to an overall plan of transmitting electricity in the public interest. These considerations have to do with whether the proposed line is

necessary. However, whether the proposed line is necessary is not the only factual consideration the statute directs the Board to determine. Pursuant to § 478.18, the Board is directed to consider whether the line will be constructed near and parallel to the right of way of railways or along division lines of the land.

B. DOES THE PROPOSED LINE COMPLY WITH § 478.18?

Iowa Code § 478.18 states:

Said transmission line shall be constructed near and parallel to the right of way of the railways of the state or along the division lines of the land, according to the government survey thereof, wherever the same is practicable and reasonable, so as not to interfere with the use by the public of the highways or streams of the state, nor unnecessarily interfere with the use of any lands by the occupant thereof.

Iowa Code § 478.18 makes it mandatory that the transmission line follow the routes set out in the statute. Thus, the line must be constructed near and parallel to the right of way of the railways of the state or along the division lines of the land. The statute states the only time the line may deviate from these requirements is where it is not practicable or reasonable. In Hanson v. Iowa State Commerce Commission, 227 N.W.2d 157, 163 (Iowa 1975), the Court stated the starting point for route selection must be railroads and division lines; a transmission line may deviate only where and to what extent deviation is justified by practicability and reasonableness.

After reviewing the record, the Board agrees with the administrative law judge's finding that IES's proposed route started with neither railroad right-of-way nor division lines of land. Nor is there any evidence in the record that IES attempted to

show routes along railroad right-of-way or division lines of land would be impractical or unreasonable.

On appeal, IES argues much of the proposed line follows railroad right-of-way. However, there is evidence in the record that the railroad right-of-way had been abandoned by the railroad. Railroad service had ceased, some of the track and facilities had been destroyed, and the adjacent landowners had title to the right-of-way. IES sought easements from the adjacent landowners rather than a railroad entity. (Tr. 601-03, 631, 680-81). In Macerich Real Estate Co. v. City of Ames, 433 N.W.2d 726 (Iowa 1988), the court stated that actual cessation of service extinguishes the railroad's easement.

The stated purpose of the § 478.18 requirements that the line be placed on railroad right-of-way or division lines of land is "so as not to interfere with the use by the public of the highways or streams of the state, nor unnecessarily interfere with the use of any lands by the occupant thereof." The purpose of the statute is not met if the railroad right-of-way is abandoned and there is no barrier to the use of the land for things other than a railroad right-of-way. Therefore, the Board finds the fact that part of IES's proposed route follows abandoned railroad right-of-way does not make the route in compliance with § 478.18.

IES also argued on appeal that part of the proposed route follows division lines of land. According to IES, abandoned railroad right-of-way or a river could be called a division line of land. In Hanson at page 159, the Court defined a division line of land as "section lines, quarter-section lines, and quarter-quarter section lines

which divide land into 640-acre, 160-acre, and 40-acre tracts respectively.” Neither abandoned railroad right-of-way nor a river is included in that definition. Even if there is authority for including a river in the definition of division line of land, the record shows the route proposed by IES ranges from a few hundred feet to well over a mile from the river. (Petition Exhibit B).

Therefore, the Board finds the route proposed by IES does not comply with the requirements of Iowa Code § 478.18. It does not follow railroad right-of-way or division lines of land. In addition, IES did not provide evidence that routes along railroad right-of-way or division lines of land would be impracticable and unreasonable. Instead, IES argues on appeal that its deviations from railroad right-of-way and division lines of land were practicable and reasonable. This justification reverses the analysis required by Iowa Code § 478.18.

C. WHAT IS THE APPROPRIATE REMEDY?

In the proposed decision and order, the administrative law judge denied IES’s petition for franchise. On appeal, IES states the Board should modify the route if it finds it can not approve the route proposed by IES.

The Board finds the petition for franchise must be denied. Further, the proposed route is such a complete departure from Iowa Code § 478.18 that it can not be modified to make it comply with the requirements of § 478.18. In Hanson, the Court found a proposed route constituted a wholesale departure from railroad and land division routes and stated at page 163, “more proceedings than only another fact finding and route determination will be necessary. As the statute now stands,

the utility must hold informational meetings upon notice to affected landowners before it petitions the commission.”

IES has shown that there is a need for the line. It is unfortunate that more time must be expended before a line can be constructed. However, it is clear IES must propose a route for the line that complies with Iowa Code § 478.18 or show that it is necessary to deviate from that route because of impracticability or unreasonableness. IES has not done this and, therefore, it must begin again.

III. OTHER MATTERS

The Board has considered all other matters raised in the notice of appeal and responses. The administrative law judge’s determinations on those issues are affirmed.

IV. FINDINGS OF FACT

The administrative law judge’s findings of fact are affirmed.

V. CONCLUSIONS OF LAW

The administrative law judge’s conclusions of law are affirmed.

VI. ORDERING CLAUSES

IT IS THEREFORE ORDERED:

1. The proposed decision and order issued by the administrative law judge on March 18, 1999, is affirmed.

2. Motions and objections not previously granted or sustained are overruled. Arguments in the briefs not addressed specifically in this order are rejected, either as not supported by the evidence or as not being of sufficient persuasiveness to warrant comment.

UTILITIES BOARD

/s/ Allan T. Thoms

ATTEST:

/s/ Raymond K. Vawter, Jr. /s/ Diane Munns
Executive Secretary

Dated at Des Moines, Iowa, this 1st day of March, 2000.